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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

File: SRC 02 133 50748 Office: TEXAS SERVICE CENTER Date: JUL - 9 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

PUBLIC COPY

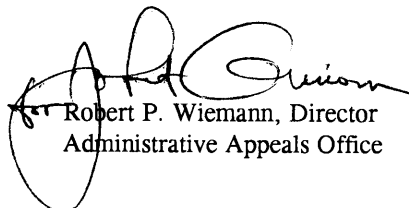
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a motor vehicle detailing and cleaning business and a pet retail business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Executive Managing Director. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the beneficiary qualifies as an executive and manager because the beneficiary is primarily engaged in executive and managerial duties.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

Furthermore, 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The United States petitioner was incorporated in June 2000 and states that it is an affiliate of Auto Centro La Once, located in Santa Marta, Colombia. On Form I-129 the petitioner declared one employee and approximately \$15,000 in gross revenues. The initial petition was approved and was valid from April 12, 2001 to April 11, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$35,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised,

functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petition requesting L-1 classification for the beneficiary indicated that the petitioner was initially in the business of motor vehicle detailing and cleaning and related services and expanded its operations to the pet retail business. The petitioner included statements describing the beneficiary's duties as follows:

Mr. [REDACTED] continues to be employee [sic] by Auto Center Mobil USA, L.L.C., as its Executive Managing Director. In this position Mr. [REDACTED] handles all managerial, financial and marketing aspects of the U.S. Corporation, he also develops and establish [sic] policies and objectives for the business; he determines the progress and status of financial programs to provide funding for new or continuing operation to maximize returns on investments and to increase productivity. He plans and develops labor investments and public relations policies designed to improve the company's image and the relations with customers, employees and the public. He evaluates the performance of subordinates for compliance with establishing policies, and he has the authority to hire and fire employees,

sign contracts and leases, and to exercise authority over those who are handling the day-to-day operation of the company. In addition, he handles and supervises the handling of all banking and financing records and transaction. He reviews and analyses [sic] expenditure, financial and operations reports to determine requirements for increasing profits, such as need for increase in fares ore [sic] fees, expansion of schedules and services. Indeed, Mr. [REDACTED] directs marketing and sales, and directs the overall course of business.

The petitioner also stated on Form I-129 that there was one employee. The petitioner submitted additional documents in support of its petition. The petitioner submitted an Occupational License Tax Certificate, dated 09/19/2000, for Auto Center Mobil USA LLC that listed one employee. The petitioner submitted a Profit and Loss statement for January through October 2001 prepared by Yesit Campo, P.A., a certified public accountant, which stated payroll expenses as \$31, 013. Also, the petitioner submitted a copy of a lease for the time period April 2000 to March 2001. Additionally, the petitioner submitted sample sales contracts for Puppy Way.

On June 21, 2002 the director requested additional evidence establishing that the beneficiary is employed in an executive or managerial position by the U.S. company. This evidence should include a statement describing in detail the duties of the beneficiary and this statement should provide the following:

1. position title;
2. list of all duties;
3. percentage of time spent on each duty;
4. number of subordinate managers, supervisors or other employees who report directly to the beneficiary;
5. a brief description of their job titles and duties.

The director also requested a statement describing the staffing of the U.S. operation that clearly indicates the number of employees, the exact position held by each employee, and his/her job duties as well as any evidence of contract employees. The director requested additional information regarding the business such as the hours of operation and the days of the week the business is open. The director requested information about who performs the day-to-day duties, such as answering phones, mailing letters and caring for/selling puppies. Additionally, the director requested a work schedule for all employees.

In response to the director's request for evidence that would demonstrate that the beneficiary would be employed in an executive or managerial capacity, counsel provided a statement explaining staffing and job duties and indicating that the petitioner was Auto Center Mobil USA, LLC d/b/a/Cute Puppies. Counsel stated that Cute

Puppies is in the business of selling puppies and is open Monday through Saturday from 10:00 am to 8:00 pm, and on Sunday, from 10:00 am to 5:00 pm. Counsel stated there are three employees in the office of Cute Puppies: the Manager, the Administrative Secretary and the Animal Caretaker. Counsel described the beneficiary's duties as:

As Manager, Mr. [REDACTED] directs and coordinates the activities of Cute Puppies to obtain optimum efficiency and economy of operations and maximize profits. Specifically, he plans and develops the company's policies and goals, and implement those goals through subordinate personnel. Mr. [REDACTED] directs and coordinates promotion of the puppy sales, endeavors to increase market share, and seeks to obtain competitive position in industry. He analyzes the company's budget to identify areas in which reductions can be made, and is also responsible for payroll and financial transactions of Cute Puppies. Furthermore, he coordinates the activities of the Administrative Secretary and the Animal Caretaker to effect operation efficiency and economy. He is responsible for the medical care and certification of the puppies. He receives the new order of the puppies. He locates puppy providers to diversify breeds. He reviews the daily sales reports and contracts. As the Manager, Mr. [REDACTED] confers with the Administrative Secretary and the Animal Caretaker and he reviews their activities. He is responsible for all human resource activities such as personnel interviewing and hiring. Moreover, he examines the operating reports to determine whether there should be changes in programs or operations. Finally, Mr. [REDACTED] promotes Cute Puppies in industry associations.

Counsel provided a separate breakdown of the time beneficiary spends performing job duties as follows:

Mr. [REDACTED] spends about thirty-five percent of his time in the financial, budgeting and sales operation aspects of his job and about thirty-five percent of his time ensuring that the puppies receive proper medical care and certification, as well as receiving the puppies in the office. He spends about twenty percent of his time dealing with clients. The remaining ten percent of his time is devoted to the marketing and promotion of the business.

Counsel also provided descriptions of the duties of the administrative secretary and animal caretaker.

Based on the information provided, the director determined that

with such a small staff, the beneficiary is called upon to perform many duties associated with running a business that are not managerial or executive. Therefore, the director concluded that the beneficiary is engaged primarily in the day-to-day operations of the business itself.

On appeal, counsel restates the beneficiary's job duties that were provided to the director in the response to the request for evidence. Counsel further refers to several unpublished Administrative Appeals Office decisions. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those decisions holding that the beneficiary would be employed in a primarily managerial capacity. Counsel has provided nothing except for statements from the petitioner and from counsel. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

Additionally, it is noted that petitioner indicated on Form I-129 that it employed one person. The petitioner provided the Occupational License Tax Certificate, dated 09/19/2000, for Auto Center Mobil USA LLC that stated one employee. Counsel provided the Occupational License Tax Certificate for Cute Puppies dated May 2002 which stated that there is one employee. At the time of filing the instant petition the petitioner did not submit evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. The petitioner did not mention the existence of any additional employees until counsel responded to the director's request for evidence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has not provided evidence of staffing beyond a statement from counsel. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the record is presently constituted, it is unclear if the petitioner had any employees besides the beneficiary at the time the petition was filed. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner is an auto cleaning and detailing business that has also expanded into the pet retail business. The record indicates that the beneficiary is the Executive Managing Director for Auto Center Mobil USA LLC as well as Cute Puppies. The record is not clear if the original business of auto detailing is still an ongoing business concern.

It is noted that neither counsel nor the petitioner clarifies whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he is both an executive and a manager.

In the appeal, counsel appears to be claiming that the beneficiary is employed in an executive capacity when stating the beneficiary plans and develops the company's policies and goals. Counsel also appears to be claiming that the beneficiary is performing in a managerial capacity when stating that beneficiary "coordinates the activities of the administrative secretary and the animal caretaker to effect operational efficiency and economy." Additionally, the petitioner's letter states that the beneficiary has the authority to hire and fire employees and exercise authority over those who are handling the day-to-day operation of the company. However, the record is not clear on which individual is handling the day-to-day operation of the company.

The record as constituted does not provide evidence that the beneficiary meets each of the four criteria set forth in the statutory definition for manager. The beneficiary does not supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function or component of the organization. Nor does the beneficiary meet each of the four criteria set forth in the statutory definition for executive. The petitioner has not provided evidence that the beneficiary receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization or that he will be employed primarily in an

executive capacity. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. Counsel asserts that the beneficiary is not engaged in day-to-day operations of the business even though counsel states that the beneficiary spends about 35 percent of his time ensuring that the puppies receive proper medical care and certification, as well as receiving puppies in the office. Counsel also states that the beneficiary spends about 20 percent of his time with clients. Counsel's assertions are not persuasive. The description of the beneficiary's duties and responsibilities indicates that the beneficiary is providing the necessary services to the petitioner to allow continued operation. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Although not addressed by the director, in order to qualify for an extension of a visa petition under section 101(a)(15)(L) which involved the opening of a new office the petitioner must provide certain documentation. 8 C.F.R. § 214.2 (1)(14)(ii)(D) states that the petitioner must provide a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity. The record does not demonstrate that the petitioner provided evidence of wages paid to employees. As the appeal will be dismissed on other grounds, these issues need not be addressed further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.